No. 11,352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation), *Appellant,*
vs.
RECONSTRUCTION FINANCE CORPORATION (a corporation), *Appellee.*

BRIEF FOR APPELLEE.

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SUMMARY OF CASE.

This action, to recover an additional amount (Tr. 10) of $23,049.51 in freight charges for transporting 944,032 gallons (Tr. 44) of motor benzol, is brought under Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954; 49 U.S.C.A. 65, 1945 Cumulative Annual Pocket Part) and under the Act of Congress of June 7, 1924 (43 Stat. 486; 10 U.S.C.A. 1375). The motor benzol was transported at the instance of Defense Supplies Corporation from itself (Tr. 43) as consignor from Seattle, Washington,

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Note: Throughout emphasis ours, unless otherwise noted.

to itself as consignee to Los Angeles, California (or to Vernon, California, which is within the tariff switching limits of Los Angeles) (Tr. 41). Appellant as the delivering carrier, charged with the duty of collection, presented (Tr. 44) bills for said transportation in the sum of $56,736.14, computed upon "the full commercial rates", on tariffs duly published and filed and applicable "for the public at large". Defense Supplies Corporation paid for said transportation (Tr. 44) the sum of $33,686.63, computed under land-grant deductions and mileage. Thus the disputed sum of $23,049.51 is the amount of the deducted land-grant allowances. The question here presented is whether Defense Supplies Corporation was entitled to land-grant deductions in the transportation of the motor benzol, under paragraph (a) of Section 321 of the Transportation Act of 1940, which provides in substance that "the full applicable commercial rates shall be paid for transportation", *"except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use".*

The transportation of the motor benzol was on government bills of lading, and every bill of lading was marked *"For Military Use"* (Tr. 43).

The lines of appellant, Southern Pacific Company, over which the motor benzol was transported (Tr. 210) were constructed with the aid of grants of land from the United States. The portions of the lines of the other carriers by railroad over which the motor benzol was transported, were either similarly

constructed with the aid of grants of land from the United States, or with respect to such portions of the lines not so constructed with such aid, such carriers had previously entered into "equalization agreements" with the United States, whereby the net charges to the United States for transportation over such lines were equalized with the transportation charges applicable to transportation over lines constructed with the aid of such grants of land (Tr. 45). Prior to the times of the transportation of the motor benzol, appellant and the other participating carriers by railroad, had duly filed (Tr. 46) with the Secretary of the Interior of the United States certain releases required by paragraph (b) of Section 321 of the Transportation Act of 1940. Thus, appellant and the other participating carriers by railroad had fully qualified under the requirements of paragraph (b) of said Section 321, not only to receive the benefits provided for full applicable commercial rates under paragraph (a) of said Section 321, but also by the same token to bear the burdens of land-grant deductions imposed by the identical paragraph (a) in respect of the transportation of military or naval property of the United States moving for military or naval use.

The original defendant (Tr. 32), Defense Supplies Corporation (hereinafter called Defense Supplies) was during all of the pertinent times and prior to July 1, 1945, a corporate instrumentality of the United States, duly created on August 29, 1940 on approval of the President, *to aid the Government of the United States in the national defense* (Tr. 53),

pursuant to the authority contained in Section 5d(3) of the Reconstruction Finance Corporation Act as amended (15 U.S.C.A., Sec. 606b(3), enacted June 25, 1940). Under the expressed words of the Act of its creation, which are reiterated in its charter as amended (Tr. 53), Defense Supplies was organized specifically to deal in strategic and critical materials as defined by the President and in all materials necessary in and for the *manufacture of* any materials and *supplies necessary to the national defense.* Its charter as amended expressly provides that Defense Supplies: "take such other actions as the President and the Federal Loan Administrator may deem *necessary to expedite the national defense program",* and "shall be an instrumentality of the United States Government" (with free use of the mails) "and in all other respects possessed of the privileges and immunities that are conferred upon the Reconstruction Finance Corporation", by law.

Rubber Reserve Company, hereinafter mentioned and called Rubber Reserve, on June 28, 1940, was similarly and under the same Act, duly created a corporate instrumentality of the United States *to aid the Government of the United States in the national defense,* with like charter powers (Tr. 92) and with objects and purposes especially devoted to dealing in, *producing, processing* and *manufacturing* rubber as well as related materials and substances.

On April 2, 1942, *the War Production Board* in writing (Tr. 35) recommended that Defense Supplies

purchase (as a commencement) 50,000,000 gallons of motor benzol for essential use in the synthetic rubber program *for manufacture of styrene,* and also for essential use as an *addition* to 100 octane gasoline either as benzol or as *a derivative of benzol.* On April 7, 1942, Defense Supplies adopted (Tr. 33) resolutions, soon amended, to purchase 50,000,000 gallons of motor benzol, and to enter into such agreements and arrangements as may be necessary for the *purchase, transportation, processing, sale* and *disposition* of the motor benzol and *by-products resulting therefrom* (Tr. 34). Pursuant to *allocations by the War Production Board* (Tr. 42) the motor benzol involved in the asserted freight charges was purchased by Defense Supplies from Seattle Gas Company, at Seattle, Washington. On arrival at destination, the motor benzol was first stored by Defense Supplies under written contract with Wilshire Oil Company (Tr. 68) at its Vernon Tank Farm.

Cumene and ethyl benzene (Tr. 51) are components in the manufacture of 100 octane aviation gasoline, and styrene is a component (Tr. 50) in the manufacture of synthetic rubber. However, untreated motor benzol is not suitable (Tr. 46) for use in the manufacture of cumene, ethyl benzene or styrene until it is first processed into industrial pure benzol.

In October, 1943 (Tr. 46), Defense Supplies entered a written contract with Shell Oil Company, whereby Shell processed the 944,032 gallons of untreated motor benzol at Shell's Wilmington Refinery

near Watson, so as to produce therefrom (Tr. 47) industrial pure benzol. Under allocations of the *War Production Board* and recommendations of *Petroleum Administration for War* and the *Office of Rubber Director* (Tr. 48), Defense Supplies in November and December, 1943, entered written contracts with Wilshire Oil Company, Richfield Oil Corporation and Rubber Reserve, whereby Defense Supplies sold all the industrial pure benzol so produced by Shell (Tr. 48): 40.56% thereof to Wilshire and Richfield *all* for use in the *manufacture of cumene* for use only by or as directed *by the United States Government* (Tr. 86 and 88); and the balance (59.44%) thereof to Rubber Reserve *all* for use in the *manufacture of styrene* for use only by or as directed by *the United States Government.*

The 59.44% of the industrial pure benzol purchased by Rubber Reserve, was first used (Tr. 49) to make ethyl benzene. The ethyl benzene manufactured by Rubber Reserve from 23.06% of the industrial pure benzol (Tr. 50) was used by Rubber Reserve in manufacturing styrene, which under *allocations* (Tr. 50) *by the Office of Rubber Director* was sold to rubber companies for use in making synthetic rubber. Said rubber companies either used this synthetic rubber to manufacture rubber products or sold it to other companies for the manufacture of rubber products. 42% of the rubber products so manufactured was sold directly to Army and Navy for their uses, and 58% thereof was sold for civilian uses, *only under allocations by War Production Board.* Thus, 9.66% of the

original motor benzol was used in the production of rubber products for Army and Navy in and for war, and 13.4% thereof was used in the production of rubber products for civilian uses, allocated by *War Production Board.*

The ethyl benzene made by Rubber Reserve from the remaining 36.38% of the industrial pure benzol was sold (Tr. 155) by Rubber Reserve under written contracts by the direction of *Petroleum Administration for War* (Tr. 50) to refineries engaged in producing 100% octane aviation gasoline for sale under written contracts to Defense Supplies. From December 2, 1942, the manufacture, use and disposition of ethyl benzene and cumene were under the direct control and administration of the *Petroleum Administration for War* (Tr. 51). Under said Administration, the cumene made by both Wilshire and Richfield from the industrial pure benzol sold to them by Defense Supplies (Tr. 51) was used by them to make 100 octane aviation gasoline, which was sold by them to Defense Supplies under written contracts. All the 100 octane aviation gasoline so purchased from said refineries and from Wilshire and Richfield by Defense Supplies was sold by Defense Supplies to Army and Navy under written contracts (Tr. 52) executed by the *War Department, the Navy Department, Petroleum Administration for War* and Defense Supplies. Thus, 76.94% of the industrial pure benzol produced from the 944,032 gallons of motor benzol was channeled to Army and Navy in the form of 100 octane aviation gasoline, or a total of 86.6% of the benzol to Army and Navy, in and for war.

Reconstruction Finance Corporation, a corporation (hereinafter called R.F.C.), was substituted as defendant herein in the place of Defense Supplies (Tr. 197). Under Senate Joint Resolution 65 (Public Law 109-79th Congress, c. 215, 1st Session), approved June 30, 1945, Defense Supplies was dissolved as of July 1, 1945, and all its functions, powers, duties and authority, together with all its documents, books of account, records, assets and liabilities of every kind and nature were transferred to R.F.C. to be performed, exercised and administered in the same manner and to the same extent and effect as if originally vested in R.F.C. (Tr. 195).

The aforesaid summary presents the ultimate facts found below on the stipulated evidence, and the evidentiary facts will be detailed in our argument.

ARGUMENT.

PART I.

THE TRANSPORTATION ACT OF 1940. ITS HISTORY AND CONSTRUCTION.

Paragraphs (a) and (b) of Section 321 of the Transportation Act of 1940 (set forth in Appendix A) were enacted on September 18, 1940.

The history of land-grant tariff deductions is well condensed in *Powell v. United States* (1945), 60 F. Supp. 433 at 435-436. Prior to September 18, 1940, the United States was entitled to land-grant deductions upon the transportation of *all* its property moving

over railroads which received land grants from the United States and over other railroads signing "equalization agreements" to meet the land-grant railroad rates. (*Lake Superior & M. R. Co. v. United States,* 93 U. S. 442, 23 L. Ed. 965; *Atchison T. & S. F. R. R. Co. v. United States,* 15 Ct. Cl. 126; *Powell v. United States,* 60 F. Supp. 433; *United States v. Galveston Ry. Co.,* 279 U. S. 401, 73 L. Ed. 760.)

In 1924, by the *Act of June 7, 1924,* Chap. 291, Title I, 43 Stat. 486, 10 U.S.C.A. sec. 1375 (set forth in Appendix B), Congress vested authority in the Secretary of War to fix such rates for the transportation of *all* property of the United States over land-grant roads as he deemed just and reasonable, but not exceeding fifty (50%) per cent of the full amount of compensation for like transportation performed "for the public at large." Then came the *Transportation Act of 1940.* The effect of paragraph (a) of Section 321 of the Act of 1940 is to yield the right of the United States to land-grant deductions in the transportation of *all* of its property and to limit such right to "the transportation of military or naval property of the United States moving for military or naval and not for civil use".

Specifically, we now have a very recent decision, dated July 8, 1946 from the Circuit Court of Appeals, Seventh Circuit, in the case of *Northern Pacific Railway Company v. The United States of America,* ----------, which holds:

> "Prior to the passage of the Transportation Act of 1940 *all* property owned by the United

States moved over land grant routes at land grant rates. From time to time, Congress has passed legislation relieving the railroads of the obligation to give to the Government certain preferential treatment in rates. The Transportation Act of 1940 carried this legislative tendency further.

* * * * * * *

We must remember that *all* Government property moving over land grant railroads moved at the reduced land grant rates, before Section 321 (a) was introduced. As originally drawn, Section 321 (a) would have made all Government property moving over land grant railways move at the regular commercial rates as paid on non-land grant railways. In the Interstate Commerce Committee of the Senate, an exception was inserted which retained the reduced land grant rates on 'military or naval property of the United States moving for military or naval and not for civil use'.

* * * * * * *

This exception was written for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress.''

More of this so applicable case, hereinafter.

In the construction of a Land Grant Act, it was said in *United States v. Galveston etc. Ry. Co.,* 279 U. S. 401, 73 L. Ed. 760, ''the terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction''. And in that very case the Supreme Court also stated:

> "The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a *continuing one. It is of great value to the Government* and of course correspondingly burdensome to the carriers."

Thus, another related rule of construction applies. A right "of great valule to the Government" was yielded under the Act of 1940 in the relinquishment of the "continuing right" to land-grant deductions in the transportation of *all* property of the United States. A cardinal rule for the construction of such legislation in derogation of the public right and interest, is stated in *Slidell v. Grandjean* (1883), 111 U. S. 412, 437, 28 L. Ed. 321, 329:

> "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, *or the relinquishment of a public interest,* and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual."

It is well established that in legislative grants to railroads, rights claimed against the Government must be so clearly defined that there can be no question of the purpose of Congress to confer them; and Courts in construing such a statute may with propriety recur to the history of the times when it was passed. *Leavenworth, Lawrence & Galveston R. R. Co. v. United States,* 92 U.S. 733, 740, 23 L. Ed. 635; *Southern Pacific Co. v. United States,* 307 U.S. 393, 401, 83 L. Ed.

1363, 1369; *Great Northern Ry. Co. v. United States,* 315 U.S. 262, 86 L. Ed. 836.

It is true that under the provisions of paragraph (b) of Section 321 of the Act of 1940, land-grant and equalization-agreement railroads did not become entitled to the benefits yielded by paragraph (a) of Section 321 of the Act, unless they had filed with the Secretary of the Interior releases of claims against the United States to certain lands. Nevertheless, and in respect of such releases, said paragraph (b) further provides that:

> "Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it".

Under the language of the Act itself, the releases to be given by the railroads related only to unpatented or uncertified lands, while the United States yielded the "continuing right" "of great value to the Government" to have *all* its property transported under land-grant deductions.

PART II.

THE MOTOR BENZOL, NAKED LEGAL TITLE TO WHICH AT THE TIME OF ITS TRANSPORTATION WAS IN THE NAME OF A CORPORATE INSTRUMENTALITY OF THE UNITED STATES, SUCH AS DEFENSE SUPPLIES CORPORATION, WAS "PROPERTY OF THE UNITED STATES" WITHIN THE MEANING OF PARAGRAPH (a) OF SECTION 321 OF THE TRANSPORTATION ACT OF 1940, AND THE UNITED STATES WAS THE REAL AND BENEFICIAL OWNER THEREOF.

The war-born status of the original defendant, Defense Supplies, is clear. It was (Tr. 32) during all the times herein involved and prior to July 1, 1945, a corporate instrumentality of the United States, duly created on August 29, 1940 by R.F.C. at the request of the Federal Loan Administrator with the approval of the President, pursuant to the authority contained in Section 5d (3) of the Reconstruction Finance Corporation Act, as amended (15 U.S.C.A., sec. 606b (3), amended June 25, 1940), (set forth in Appendix C), with its principal office located in the City of Washington, District of Columbia, and with an agent and representative in the City and County of San Francisco, in the Northern District of California (Tr. 32). Under the specific words of the Act of its creation, Defense Supplies was organized "to produce, acquire, carry, sell or otherwise deal in strategic and critical materials as defined by the President," and "to purchase and *produce* materials and supplies for the *manufacture* of strategic and critical materials and any other supplies *necessary to the national defense,* and such other supplies and materials as may be required in the *manufacture* or use of any of the foregoing, or otherwise necessary in connection therewith." As the name Defense Supplies implies, so also

its charter, as amended (Tr. 53), recites that Defense Supplies Corporation is created to *aid the Government of the United States in its national-defense program,* and sets forth its objects, purposes and powers in substantially the same language that such objects, purposes and powers are set forth in the Act of Congress pursuant to which it was created. The total authorized capital stock (Tr. 56) of Defense Supplies was $5,000,000. The stock was of one class, with a par value of $100 per share, issued for cash only, and R.F.C. subscribed for all of the capital stock of Defense Supplies, and said stock was not transferable. The affairs and business of Defense Supplies were managed by a board of directors appointed by R.F.C. The authorized and issued capital stock of R.F.C. is wholly owned by the United States. R.F.C. was created with capital stock of $500,000,000 subscribed by the United States of America, subject to call in whole or in part by its board of directors, appointed by the President by and with the advice and consent of the Senate (15 U.S.C.A. 602-603).

We have heretofore shown that the construction of paragraph (a) of Section 321 of the Act of 1940 must be strictly in favor of the Government in its derogation of public right and interest. The section itself nowhere contains language designed to exclude property standing in the name of a corporate instrumentality of the United States from the term "property of the United States". Appellant seeks to draw some inference regarding the intention of Congress from the fact that Section 322 of the Act of 1940, with respect to the right of the United States to deduct past

overpayments from sums later found due to the carriers, uses the term "United States Government". It would seem better to seek direct comparison in the very text of the same paragraph (a) of Section 321. This paragraph itself expressly includes, in the same exception from full commercial rates, not only "the transportation of members of the military or naval forces of the United States", but even the transportation of "*property* of such members, when such members are traveling on official duty". It does not seem logical to assert that Congress in the same provision, which yielded to the carriers a right "of great value to the Government", intended to include in the exception from full commercial rates the *property owned absolutely and personally by individuals* of the military or naval forces, and to exclude from such exception property of which the United States is the real and beneficial owner.

It cannot be doubted that two of the essential inherents of the ownership of property are, the right of the owner to sue for or in respect of his property, and the burden of the owner in bearing taxes lawfully levied thereon. In holding not only that the United States may sue for or in respect of property standing in the name of its corporate instrumentality, but also in holding that state and local taxing officials may not lawfully levy taxes upon property standing in the name of a corporate instrumentality of the United States, the Courts, *both before and since* the enactment of the Transportation Act of 1940, have uniformly decided such issues upon the ground that such property is in fact the property of the United States.

In the light of our decisions, firmly establishing the proposition that property standing in the name of a corporate instrumentality of the United States is in fact the property of the United States, it must be held that the motor benzol involved in this case, title to which at the time of its transportation stood in the name of Defense Supplies, a corporate instrumentality of the United States, was "property of the United States" within the meaning of paragraph (a) of Section 321 of the Transportation Act of 1940.

In *Defense Supplies Corporation v. United States Lines Co., et al.* (D.C.N.Y. 1944), 57 F. Supp. 291, it was held that a cargo of wool shipped from Australia and consigned to Defense Supplies was in fact property of the United States though title thereto stood in the name of Defense Supplies. The Court pointed out that the wool was intended solely for the Government's emergency stock pile, the creation of which was distinctly a war measure. The Court said:

> "The wool, all technical questions of title aside, was in reality the property of the United States, and was to be used for the benefit of the Government, at such times and manner as the appropriate official might decide upon. That this must be so seems abundantly clear from the decision of the Supreme Court in Inland Waterways Corporation v. Young, 309 U.S. 517, 524, where funds of a non-public character, and nominally owned by a governmental agency, were held, from a practical standpoint, to be those of the United States. * * * *The only reason for its* (Defense Supplies) *existence* was that the Government, through its corporate form, might more readily

> and easily than would otherwise be possible, engage in activities designed and intended to be *part and parcel of the war effort.*"

This case was affirmed by the Circuit Court of Appeals, Second Circuit (1945), 148 F. (2d) 311, stating that Defense Supplies was *completely owned by the United States.*

In the mentioned Supreme Court decision in *Inland Waterways Corporation v. Young,* 84 L. Ed. at 906, it was held:

> "The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits * * * The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive (citing cases). The funds of these corporations are for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses (citing cases and Annual Reports of U. S. Shipping Board, of Merchant Fleet Corporation, and of Inland Waterways Corporation)."

This Circuit Court of Appeals, Ninth Circuit, in *King County (Wash.), et al. v. United States Shipping Board Emergency Fleet Corporation* (1922), 282 Fed. 950, where officials of plaintiff county sought to tax property held by defendant corporation, which was organized, with all of the stock thereof owned, by the United States, the Court in holding that the property of the corporate instrumentality belonged

to the United States and was therefore not subject to plaintiff's taxing power, stated (p. 953):

> "But here, admittedly, the property is not only held by a governmental agency, but was acquired with public funds, and was to be used for public purposes. To hold that it lost its public character because the Government chose to have the legal title taken in the name of a corporation which it brought into existence and completely controls for its own convenience, and the entire capital stock of which it owns, would be to sacrifice substance to form * * * Clearly * * * in the purchase of property for Government purposes, and in taking and holding legal title thereto, the corporation was acting as a naked trustee, and the entire beneficial interest was in the Government."

Moreover, in distinguishing the *Sloan Shipyard Case* (cited in appellant's brief pp. 31, 64) this Court pointed out that:

> "* * * It is not thought that the question (exemption of Fleet Corporation property from state taxes) is foreclosed by the Sloan Shipyard decision. That case had to do with the intent of Congress upon another subject, the status of the corporation; *but here we are concerned with the status of the property and the intention of Congress in respect thereto* * * *"

In *Callam County (Wash.), et al. v. United States and United States Spruce Production Corporation* (1923), 263 U. S. 341, 68 L. Ed. 328, the tax authorities imposed a tax upon the property of Spruce Production Corporation, which had been organized as a

corporate instrumentality for carrying on the first World War, and all its property had been conveyed to it by the United States or bought with Government money. The Court, in holding the tax invalid, said at page 331 of 68 L. Ed.:

> "The State claims the right to tax on the gound that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds; but that taxation of the property of the agent is not taxation of the means. We agree that it 'is not always, or generally, taxation of the means' as stated by Chief Justice Chase in Thompson v. Union Pacific Railroad, 9 Wall. 579, 591. But it may be, and in our opinion, clearly is, when, as here, not only the agent was created but all the agent's property was acquired and used, for the sole purpose of *producing a weapon for the war.* This is not like the case of a corporation having its own purposes as well as those of the United States, and interested in profit on its own account. The incorporation and formal erection of the new personalty was only for the convenience of the United States to carry out its ends."

In *United States Shipping Board Emergency Fleet Corporation v. Delaware County, Penn.* (C.C.A. 3) (1927), 17 F. (2d) 40, certiorari denied 278 U. S. 607, 73 L. Ed. 533, the county attempted to tax the property of the corporation which was created by the Government and whose stock was owned and whose assets were furnished by the Government. The Court decided that the property was not subject to taxation and said, at page 40 of 17 F. (2d):

> "In the light of such facts, and there being no suggestion of ownership or interest elsewhere, it is clear that the real ownership of the land was and is in the United States, and that the Fleet Corporation, the holder of the title, held said title as a mere legal holder for the benefit of the United States."

In *City of Clifton v. State Board of Tax Appeals* (1941, N. J.), 17 A. (2d) 476, the city had assessed personal property, title to which stood in the name of *Reconstruction Finance Corporation,* an instrumentality of the United States, and the appellee in the case at bar, standing in the same position as Defense Supplies, the original defendant herein. In holding that the property was exempt from taxation, the Court said at page 477:

> "A single question is presented, namely, whether the property in question is the property of the United States and subject to exemption from taxation because of a lack of power in the states to tax property of the United States and its governmental agencies * * *
>
> "When consideration is given to the purposes, organization, and operations of the corporation, it becomes apparent it was designed to be and in fact is a governmental agency of the United States and that the property held by it is property of the United States.
>
> "In United States v. Lewis, D. C., 10 F. Supp. 471, 474 it was said: 'There is no doubt whatever that all the property of the Reconstruction Finance Corporation is in reality the property of

the United States Government, and that all the activities of that corporation were just as much activities of the government as if they were conducted by the Secretary of the Treasury in his official capacity, or by some other governmental official'.

"It was further said: 'If the Act of Congress instead of creating the Reconstruction Finance Corporation, had created an executive office and provided for the appointment of a natural person to fill the same, and had invested such official with the powers conferred on the Reconstruction Finance Corporation, no one would question the proposition that such official was an agent of the United States Government, and that all the property which he held was the property of the United States; and this is none the less true because Congress had seen fit to use a corporation instead of a natural person'."

There are numerous other cases similarly holding it is unquestioned that property of corporate instrumentalities of the United States is the property of the United States. Among others, see:

New Brunswick v. United States (1928), 276 U. S. 547, 72 L. Ed. 693; *United States Spruce Production Corporation v. Lincoln County, et al.* (1922), 285 F. 388; *United States v. Coghlan* (1919), 261 F. 425; and *United States Housing Corporation v. City of Watertown* (1920), 185 N.Y.S. 309.

The line of cases holding that the United States may sue in its own name for or in respect to property standing in the name of its corporate instrumentalities

is equally unanimous in deciding that such property is in fact the property of the United States.

In *Cherry Cotton Mills Inc. v. United States* (1945, Ct. Cl.), 59 F. Supp. 122, an action was commenced by the plaintiff, Cherry Cotton Mills Inc. against the United States to recover processing and floor stock taxes paid under the unconstitutional Agricultural Adjustment Act. The United States filed a counterclaim based upon an indebtedness immediately owing by Cherry Cotton Mills to *Reconstruction Finance Corporation.* The counterclaim was filed under the provisions of Section 145 of the Judicial Code (38 U.S.C.A., Section 250 (2)):

> "The Court of Claims shall have jurisdiction to hear and determine the following matters: Second. All setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or any other demands whatsoever on the part *of the Government of the United States* against any claimant against the Government in said Court * * *"

In holding that the United States Government could properly file a counterclaim on the basis of an indebtedness due to R.F.C., the Court stated:

> "The R.F.C. is an agent of the Government, a device for accomplishing the Government's purposes with the Government's money. The text of the statute creating the R.F.C., 47 Stat. 5, 15 U.S.C.A. 601-617 makes this plain. The Government's assets and credits stand behind the R.F.C.'s obligations, and the R.F.C.'s losses are the Government's losses. Debts owing to the

R.F.C. are owed to it as agent and trustee for the Government. We use the word trustee since the R.F.C. does have the legal capacities of a separate legal person, to own property and to sue and be sued. But these powers and capacities are held by it in trust, for the benefit of one sole beneficiary, the Government. Looking through the trust, the assets and claims held by the R.F.C. are in substance and in equity, assets and claims of the Government which are kept, for convenience, in a different receptacle from the one in which the Government keeps most of its money, viz., the Treasury.

"In the case of Crane, et al., Receivers, v. United States, 55 F. (2d) 734, 73 Ct. Cl. 677, certiorari denied 287 U. S. 601, 53 S. Ct. 7, 77 L. Ed. 523, this Court allowed the United States to recover a judgment on a counterclaim against a plaintiff who sued for the refund of taxes, and who had given a bond to the United States Shipping Board Emergency Fleet Corporation. It held that whether or not the Fleet Corporation was *an entity separate from the United States was immaterial.*"

Further the Court, in distinguishing the case of *R.F.C. v. J. G. Menihan Corp.* (cited in appellant's brief, pp. 35, 38, 42), stated as follows:

"Cases holding that R.F.C. is liable to costs, as other litigants are, R.F.C. v. J. G. Menihan Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595, or that the Federal Housing Administration is subject to garnishment under the state law for wages due to an employee, Federal Housing Administration v. Burr, 309 U. S. 242, 60 S. Ct. 488,

84 L. Ed. 724, are not of significance in the solution of our problem. The Supreme Court in those cases was only deciding what Congress meant when it endowed Government corporations with the capacity to sue and be sued. It held that Congress intended that they could be sued like private persons, and that sovereign immunity from suit was waived. *But no Court has decided* that Congress has shown any intention that the United States must pay out money to one who is indebted to it, through its agent and trustee, in a greater amount on a debt past due. That would not be a waiver of sovereign immunity, but a subjection of the sovereign's finances to risks and inconveniences to which no private person is by law subjected."

Finally, the Court clearly pointed out the immateriality to the issues involved in the case of the manner in which the United States has chosen to have its own financial transactions and those of its agents audited, stating as follows:

"We do not regard as material the part which the General Accounting Office played in the transaction here in question. We think it was the duty of someone, on behalf of the Government to see that this set-off was made. Whether the statute defining the functions of the Comptroller General lodged that duty there, or not, is a matter which would seem to be no concern of the plaintiff. How the Government inside its own organization, took care that its right of set-off should not be overlooked, in its multiplicity of transactions, is not material".

Other cases applicable include *Erickson v. United States* (1924), 264 U.S. 246, 68 L. Ed. 661; *Reconstruction Finance Corporation v. Krauss, et al.* (D.C. N.J. 1935), 12 F. Supp. 44; *United States, et al., v. Arthur, et al.* (D.C.S.D. N.Y., 1937), 23 F. Supp. 537; *United States v. Freeman* (D.C. Mass. 1937), 21 F. Supp. 593; and *United States v. Skinner & Eddy Corporation* (D.C. Wash.), 28 F. (2d) 373.

The principle and reasoning of all of the foregoing cases apply to the property, the motor benzol, standing in the name of Defense Supplies, which was created pursuant to an Act of Congress to aid the Government of the United States in the national defense, with its statutory and charter purposes to carry out governmental functions of the United States for and in war, financed by the United States and wholly controlled by the United States, with its non-transferable stock wholly owned by R. F. C., whose stock was wholly subscribed and owned by the United States.

By reason of the authorities aforesaid and the record facts heretofore recited and to be hereinafter developed, it must be concluded that the motor benzol was at the time of its transportation "property of the United States" within the meaning of paragraph (a) of Section 321 of the Transportation Act of 1940.

Appellant repeatedly reiterates, that there is a distinction or separateness between its corporate instrumentality Defense Supplies and the United States itself. We answer with: (1) this Circuit Court of

Appeals, Ninth Circuit (*King County v. U. S. Shipping Board* (supra), 282 F. 950), that the status of the corporate entity is another subject, *"but here we are dealing with the status of the property"*; and (2) the case of *Crane, et al., Receivers, v. United States,* 55 F. (2d) 734, 73 Ct. Cl. 677, certiorari denied 287 U. S. 601, 53 S. Ct. 7, 77 L. Ed. 523, to the effect that whether or not a corporate instrumentality (Fleet Corporation), is an entity separate from its principal the United States is immaterial. We observe there also is a distinction between its every duly constituted officer, a natural person whether elective or appointive, and the United States. We conclude, by remarking that our answer is both ancient and recent. Of old, in *M'Culloch v. Maryland,* 17 U.S. 315, 4 L. Ed. 579, Chief Justice Marshall stated that in carrying out its enumerated powers, the Federal Government has power to create and use such agencies as it sees fit, such as creating a corporate instrumentality (a bank) and that the power of creating such a corporation is never used for its own sake but for the purpose of effecting something else; that the power to create includes the power to preserve; and that the states by taxing such agencies could destroy the same or nullify the powers granted to the Federal Government. In newer days, Justice Jackson, in the same vein but in other terms and speaking of the same subject of taxing property standing in the name of a corporate instrumentality of the United States, said in *United States v. County of Allegheny* (1944), 322 U.S. 174-198, 88 L. Ed. at 1219:

"The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in some one who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor * * * But neither he nor the Government can be taxed for the Government's property interest."

PART III.

THE MOTOR BENZOL, AT THE TIME OF ITS TRANSPORTATION, WAS "MILITARY OR NAVAL" PROPERTY OF THE UNITED STATES AND WAS "MOVING FOR MILITARY OR NAVAL AND NOT FOR CIVIL USE", WITHIN THE MEANING OF SECTION 321 (a) OF THE TRANSPORTATION ACT OF 1940.

At once, under this caption, appellee again recurs to the so recent and applicable decision in *Northern Pacific Railway Company v. The United States of America* (C.C.A. 7), ( ), wherein the sole question directly presented was whether each of five shipments of property was a shipment of *"military or naval property moving for military or naval, and not for civil use"*. The property in each shipment was: (1) *Copper cable,* to be used on a hull being built by Seattle-Tacoma Shipbuilding Corporation under a contract with the Maritime Commission, and the hull on delivery was operated as directed by the Maritime Commission or the War Shipping Administration; (2) *Lumber,* for the construction of an ordnance plant for the manufac-

ture of ammunition under a cost-plus-fixed-fee construction and operation contract by the War Department with Federal Cartridge Corporation, and with Foley Brothers and Wallbridge Adinger Company, sub-contractors, for construction; (3) *Fir Lumber,* shipped to be urea salts treated, kiln-dried, milled, and manufactured into trestle balks and pontoon balks, sills and chess, at Crown Iron Works, pursuant to contract with the corporation; (4) *Bowling alleys,* procured on a contractor's purchase order and installed at Dutch Harbor in a building, intended for a recreation center for the contractor's men and later as a recreation center for the military personnel at the station; (5) *Liquid paving asphalt,* for use in constructing runways at an airport, under a program entitled "Development of Landing Areas for National Defense", conducted by the Civil Aeronautics Administration. The Court held:

> "At the time of the enactment of the Transportation Act of 1940 it was obvious that the general needs of security demanded a greatly expanded Army and Navy. Such enlarged military and naval forces would demand supplies and equipment far in excess of the then existing reserves. With the war spreading throughout Europe in 1940 and with the knowledge of the meager and inadequate military strength of the United States, *it is most unrealistic to presume that Congress intended any restrictive meaning of 'military and naval property' as used in the Transportation Act of that crucial year. To define 'military and naval property' in any narrow sense would be to close one's eyes to the com-*

plexities and realities of modern war. We will not impute to Congress such lack of vision".

"* * * The use to which the property was to be put was the controlling thing. If the property was to be used for military or naval purposes as distinguished from a civilian use, the property was military and naval property within the meaning of the Act. *We look to the use to which the property was to be put to determine its character for rate paying purposes.*

"When this Act was passed, Congress was engaged in strengthening our defense. War was imminent. Congress intended to save from the release of applicable land grant rates whatever of Government property was shipped over land grant railways to be used by the United States in its military and naval security program. * * * All property used for military or naval purposes was excepted from the whole category of Government-owned properties that had theretofore enjoyed the low rates prevailing on land grant railways, and for these excepted properties the low rates were to continue. That the properties transported here in question were used for military or naval purposes is apparent from a reading of the descriptions of the use to which they were put by the United States. *Congress acted while total war raged in Europe and in contemplation of our situatiton if total war should come to us, which it did. * * * Any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways, it was a kind of property Congress did not release*

from the low rates granted by the land grant railways".

It was to the same grave realities that Congress had just responded with another statute here involved. It was on June 25, 1940, that Section 5d(3) of the Reconstruction Finance Corporation Act (Appendix C) was enacted, and World War II was ablaze in Europe. On that date Congress authorized the use of corporate instrumentalities *"to aid the Government of the United States in its National Defense Program".* With our entry into war fearfully impending, on August 29, 1940, the United States on approval of the President had recourse to said Section 5d(3) of the R.F.C. Act, and thus was Defense Supplies war-born.

The words of Section 5d(3) were carried into the charter of Defense Supplies (Tr. 53) there to be a foreboding of the events to come, so soon. Statute and charter are a forecast of the fact that the actions thereby contemplated would be so vitally necessary. The charter's words (Tr. 53) last amended on July 9, 1941: "to purchase and *produce* * * * materials and supplies for the *manufacture* of strategic and critical materials * * * *of war,* and any other * * * *supplies necessary to the national defense,* and such other * * * materials as may be required in the *manufacture* or use of any of the foregoing or otherwise necessary in connection therewith", seem prophetic of: April 1942, with its Reid-War Production Board recommendations, with the prompt resolution of De-

fense Supplies as amended, all in respect of the motor benzol for defense and war.

In December 1941, war was declared. Then and thereafter Germany was marching on, and the Japanese invasion swept on to the Philippines and into the South Pacific. These grim facts served to establish the overwhelming importance of aviation in the prosecution of a modern and global war, and the dire necessity of the President's program for an annual production of 50,000 airplanes. Similarly the loss to the Japanese of the source of 90% of the world's supply of natural rubber made synthetic rubber and the "700,000 ton rubber program" *essentials for war.*

Under date of April 2, 1942, Defense Supplies received the written (Tr. 35) recommendation of the *War Production Board* to the *Department of Commerce* for the purchase of a stock pile of 50 million gallons of motor grade benzol, and this recommendation was based on (Tr. 36) the memorandum of E. W. Reid, Chief Chemicals Allied Products Branch of the War Production Board, dated March 31, 1942. As of April, 1942, let us with Defense Supplies examine the Reid memorandum (Tr. 36), which stated among other things: "subject, stock pile of benzene (benzol)"; "future essential uses in the *synthetic* rubber program for *manufacture of styrene* * * * eventually requiring 80 to 100 million gallons per year for the 700,000 ton rubber program"; "also essential use as an *addition* to 100 octane gasoline, either as benzol or as a *derivative of benzol;* this latter use has *only recently assumed significance, but may become exten-*

*sive"; * * * "since the synthetic rubber plants will be built to use impure benzol, now marketed under the term motor benzol, and since this grade constitutes two-thirds of present production, the major stock pile should be made up from the ordinary motor grade"; * * * "suggestions as to the best way to handle purchases: *purchases* should probably be made *through Defense Supplies;* the benzol will be released from this stock pile for operation of synthetic rubber plants and *perhaps also* for incorporation in 100 octane gasoline"; * * * "percentage of stock pile recommended for release to industry, *probably none;* percentage of stock pile recommended for permanent stock pile, *probably none"; * * * "it seems evident that the essential demand for benzol in 1943 will exceed production; there is a tremendous amount of benzol (100 million gallons per year) now going into motor fuel; it is imperative that this practice be stopped at once so that *this benzol will be available for synthetic rubber and aviation gasoline"; "we recommend that Defense Supplies purchase at least 50 million gallons of motor grade benzol as quickly as practicable *to be allocated for defense purposes* * * * and that *immediate action* is therefore imperative". The recommendation for 50 million gallons of motor grade benzol was increased to 65 million gallons under date of June 4, 1943 (Tr. 39).

Promptly, on April 7, 1942, Defense Supplies acted in time of war to provide the United States with aviation gasoline and synthetic rubber for use in the prosecution of the war. On said date Defense Sup-

plies adopted written resolutions which originally (Tr. 33), provided in part: "to purchase * * * not to exceed fifty million gallons of motor benzol"; * * * "to make such other arrangements as may be deemed necessary * * * including but not limited to *transportation* * * * and disposition of such motor benzol." By the very amendments to these resolutions we will show, that before the first drop of the motor benzol arrived at destination on July 28, 1942 (Tr. 43), it already was the pre-determined purpose to *process* the motor benzol and to dispose of it and its *by-products,* all in accord with the activating Reid-War Production Board program for the *"manufacture of styrene"* for synthetic rubber, and essential use in 100 octane gasoline "either as benzol or *a derivative of benzol",* and "to be allocated for *defense purposes".*

Not later than February 3, 1942 (Tr. 128) and April 29, 1942 (Tr. 102) Defense Supplies entered into "supply contracts" with the right to purchase all the production of 100 octane aviation gasoline of various refineries (Tr. 49), such as it did on these dates with Richfield and Wilshire. From the execution and provisions of such "supply contracts", it is evident that the United States intended that this aviation gasoline would be channeled directly into the hands of the War and Navy Departments for the direct prosecution of the war. These supply contracts were entered into by Defense Supplies at the *request of the Army and Navy Departments* and the *Petroleum Administration for War* (Tr. 49); they provided that certificates of inspection be delivered to

authorized representatives of the *War and Navy Departments;* and officials and employees of the *War and Navy Departments* were made agents of Defense Supplies to accept delivery of the aviation gasoline. Before the first transportation of the motor benzol in July, 1942, it is definite that the motor benzol or the derivatives therefrom, which Defense Supplies might thereafter place in the hands of refineries for processing into aviation gasoline would go to the War and Navy Departments either directly or through Defense Supplies. The sequence in the record makes this program further definite and certain by the execution on December 19, 1942, of the agreement (first of three agreements) between the *War Department, Navy Department, Petroleum Administration for War* and Defense Supplies (Tr. 170). That agreement clearly provided that the supplies of gasoline which Defense Supplies would obtain under "its supply contracts" would be made available ONLY to the *War and Navy Departments* and to consumers selected by said Departments, the Petroleum Administration for War and the British Government, sitting (Tr. 172) as an "Allocations Committee", and providing a complete procedure for the handling of such aviation gasoline.

Within or without the record there are not similar definite agreements for the channeling of synthetic rubber or its components from Defense Supplies to Army and Navy, and the reason therefor is clear. Since its creation, there stood alongside Defense Supplies and at the same address (Tr. 89) another

war-born corporate instrumentality, Rubber Reserve, created (June 28, 1940) under the same section 5d(3) of the R.F.C. Act, and which was specifically devoted to the acquisition, production and disposition of rubber (Tr. 92). There can be no doubt that before the first transportation of the motor benzol in July, 1942, it was part of the war program that synthetic rubber, quite exclusively in the domain of Rubber Reserve, would be obtained by Rubber Reserve from the motor benzol and *its derivatives.* The first essential use mentioned for the motor benzol in the Reid-War Production Board recommendation on which Defense Supplies first acted, was the essential use in the synthetic rubber program for manufacture of *styrene.* As a matter of clear fact, under the Reid-War Production Board recommendation, the use of the motor benzol was secondly mentioned as "an addition" to 100 octane gasoline either as benzol or as a *derivative of benzol;* "and this latter use has *only recently* assumed significance, but may become extensive." Furthermore, the Reid-War Production Board's recommendation expressly gives the reasons for the then contemplated priority-use of the motor benzol for the manufacture of styrene for synthetic rubber: "since the synthetic rubber plants will be built to use impure benzol" and * * * "*currently* it (benzol) cannot be incorporated in large amounts in aviation gasoline because the aircraft equipment, such as leak-proof tanks has not yet been fully converted to a type which will resist action of *benzol blends*". The greater part (59.44%) of the industrial pure benzol was diverted

to Rubber Reserve, and *at first* it was to be processed into styrene (Tr. 49), but thereafter only the 23.06% thereof (Tr. 50) was so used.

While the Reid-War Production Board's recommendation of April 2, 1942, immediately begot Defense Supplies' resolution of April 7, 1942, we find the very amendments to this resolution highlighting the development and successive steps of the motor benzol program. The early amendment of July 18, 1942, changed the words "disposition of such motor benzol" to the words "*processing* and disposition of such motor benzol *and by-products resulting therefrom*" (Tr. 34). The later amendment of September 21, 1942 changed the words "purchase and place in storage" to the words "purchase, store, and arrange for *further processing and sale* of not to exceed fifty million gallons of motor benzol" (Tr. 35). These amendment-added steps "*processing* and disposition of such motor benzol and *by-products* resulting therefrom" and "*further processing* and sale" determined every step which was in fact taken by Defense Supplies in the processing and disposition of the motor benzol and its by-products. The contemplated and the actual use of the motor benzol before and from its purchase and transportation to be and become components of synthetic rubber and aviation gasoline for the prosecution of the war, proclaims not only its "military or naval" character but also its transportation "for military or naval use". In the light of this record of the pre-ordained program for the motor benzol, it cannot be said that the anticipated proces-

sing with the addition of other necessary components to make aviation gasoline and synthetic rubber, strips the motor benzol or the use for which it was moving of "military or naval" character. There was no hesitation on the part of our Supreme Court to state that a corporate agency of the United States, created in World War I as an instrumentality for carrying on the war, was acting "solely as a means to that end", when "producing a weapon for the war" by *producing and manufacturing materials* for aircraft, such as lumber. (See quotes from *Callam County v. United States and United States Spruce Production Corporation* in Part II, page 19, of appellee's argument). Likewise, there should be no hesitancy upon the part of this Court to hold the realistic view that the motor benzol was "military or naval property" transported "for military or naval use", when Defense Supplies like the Spruce Corporation was created, and then acted, to *produce and manufacture materials for war.* Let us re-examine the steps actually taken pursuant to the planned war-use of the motor benzol.

The transportation of the motor benzol via tank-cars (Tr. 41) commenced in July, 1942 and ended in December, 1943. The purchases of the motor benzol by Defense Supplies from Seattle Gas Company from time to time during the period from June, 1942 to November, 1943, were made by Defense Supplies on written orders (letters) and acceptances pursuant to written allocations by the *War Production Board* (Tr. 42). The various shipments of the motor benzol, upon arrival at destination, were stored for Defense Sup-

plies at the Vernon Tank Farm of the Wilshire Oil Company under written contract dated May 13, 1942 (Tr. 43).

Defense Supplies contracted with Shell Oil Company on October 16, 1943 to refine the motor benzol into industrial pure benzol at the Wilmington Refinery of Shell near Watson, California (Tr. 46), and the 944,032 gallons of motor benzol transported from Seattle were thus treated and re-run by Shell (Tr. 47). Under allocations of *War Production Board* and recommendations of *Petroleum Administration for War* 40.56% of said industrial pure benzol was sold by Defense Supplies to Wilshire and Richfield under written contracts dated respectively November 16, 1943 and December 3, 1943 (Tr. 48), requiring Wilshire and Richfield to use *all* said industrial pure benzol only in the manufacture of cumene, a component of aviation gasoline, *for use only by the United States Government.* So also, and under the direction of the *Office of Rubber Director,* 59.44% of said industrial pure benzol was sold by Defense Supplies under written contract to Rubber Reserve (Tr. 89) to use *all* the industrial pure benzol for styrene, a component of synthetic rubber, *for use only by the United States Government.* At the time of the above sales, Wilshire and Richfield and various other refineries were under contract to Defense Supplies for the purchase by it of *all of the 100 octane aviation gasoline produced by them* (Tr. 49), and said contracts were made by Defense Supplies pursuant to the request of the *Petroleum Administration for War,*

the *War Department* and the *Navy Department* (Tr. 49). Along with the sales of the benzol by Defense Supplies to Wilshire, Richfield and Rubber Reserve, Defense Supplies was in December, 1942, a party to a written agreement with the *War Department, Navy Department,* and the *Petroleum Administration for War.* As a matter of fact, there were *three* such written agreements. The first dated December 19, 1942 (Tr. 52 and 170), which was modified and extended on May 20, 1943 (Tr. 52 and 160), which in turn was modified and extended on July 1, 1944 (Tr. 52 and 180). These three contracts are in substance the same, reciting that their execution and provisions are *necessary for the effective and successful prosecution of the war* (Tr. 161 and 181) and providing for the execution by Defense Supplies of contracts for the purchase of substantially the entire available production of 100 octane aviation gasoline (Tr. 161 and 170), and also providing for the right of Army and Navy to take direct deliveries of (and title to) all the 100 octane aviation gasoline purchased by Defense Supplies, with the further war-precaution that such 100 octane aviation gasoline be made available *only* to the Army and Navy (Tr. 161 and 171), with allocations to certain other consumers made solely pursuant to the direction of the Aviation Petroleum Products Allocations Committee comprising representatives of the Army, the Navy, the Petroleum Administration for War and the British Government. *More specifically* concerning the motor benzol involved in this case, all the 100 octane aviation gasoline pro-

duced by Wilshire and Richfield (Tr. 51) from the cumene made by Wilshire and Richfield from the motor benzol, and all the 100 octane aviation gasoline produced by other refineries (Tr. 51) using the ethyl benzene manufactured by Rubber Reserve from the benzol, were sold under written contracts to Defense Supplies, which sold all the 100 octane aviation gasoline it purchased from all sources to the Army and Navy under written contract (Tr. 52). From all the foregoing stipulated facts it is indisputable that: (1) from each war-allotted purchase of the motor benzol by Defense Supplies (Tr. 42) from June, 1942, to November, 1943, each step taken was the programmed use of the motor benzol in the processing and disposition of the motor benzol and the by-products resulting therefrom, and (2) from the first purchase of the motor benzol by Defense Supplies under allocation made by the War Production Board, the motor benzol and the products made therefrom were at all times strictly under the control of the United States through its numerous and named war agencies for no other reason than the contemplated use of the motor benzol in the prosecution of the war.

The fact that 86.6% of the industrial pure benzol made from the transported 944,032 gallons of motor benzol is so directly traceable to war-use by Army and Navy is a mathematical demonstration that (1) Defense Supplies consummated the pre-arranged defense and war program of the Government, based on the

Reid-War Production Board recommendation, to purchase, transport, process, sell and dispose of the motor benzol as the "Military or Naval Property of the United States" for Army and Navy, and that (2) said property in its transportation moved "for military or naval use" for its pre-ordained conversion into 100 high octane and synthetic rubber for war-use by Army and Navy.

Even had it been within the contemplation of any of the many participating war instrumentalities, agencies, boards or departments of the United States at the time of transportation, that 13.4% of the motor benzol possibly would be used for the manufacture of the "strategic and critical material" of rubber (rubber products) for civilian purposes, under the direct *allocations of the War Production Board,* this factor is so minor that this eventual use is merely incidental to the primary military and naval use.

The words "and not for civil use" in the Act of 1940 were used by way of contrast to the words, "military or naval use". They tend to indicate that a "military or naval use" may not be based upon subsidiary or secondary military or naval aspects or considerations. Conversely, they tend to indicate that "civil use" may not be based on subsidiary or secondary civilian aspects or considerations. The courts, prior to the enactment of the Transportation Act of 1940, and the United States Government subsequent thereto, have recognized the clear-cut distinction between primary or preponderant and secondary or incidental, purposes.

Thus, in *Southern Pacific Co. v. United States* (1932), 285 U. S. 240, 76 L. Ed. 736, the Court had before it the question of whether Army Engineer officers were "troops of the United States" within the meaning of a land-grant act, when assigned in time of peace to duty in connection with the improvement of rivers and harbors in California. (California Debris Commission.) In holding that the United States was not entitled to make land-grant deductions, the Court said (76 L. Ed. 739):

> "While, as is argued by the United States, river and harbor improvement have in one aspect a bearing upon the military defense of the United States, obviously the principal purpose of this work is the promotion of commerce and transportation."

Thus also, the United States Government has recognized in a time of depression and active defense that there is a distinction between military and non-military use, in terms of underlying purpose. The Emergency Relief Appropriation Act of 1941 (Pub. Res. No. 88, 76 Cong., June 26, 1940) provides for the use of funds in connection with the prosecution of projects, certified by the Secretary of War or Navy to be important for military and naval purposes. The primary aim of the Relief Act itself, however, was found to be to help the needy, by the Comptroller General. He therefore ruled that a shipment of materials, in 1941, for a project at a military camp, was not entitled to land grant deductions under the Transportation Act of 1940. (See 20 C. G. 438, 4422):

> "In other words, when consideration is given to the purpose and effect of the various provisions of the Act, it would seem that the certifications thereunder as to importance for military or naval purposes properly may be regarded * * * as pertaining to the incidental consequences or the secondary nature of the projects concerned rather than as indicating the primary character of said projects or the controlling and preponderant purposes to be served by them."

The converse of the above-stated proposition must follow—that uses primarily "military or naval" remain so notwithstanding that the use may involve some incidental or secondary civilian aspects or considerations. Appellee has established the right to land grant deductions with respect to all of the shipments of the motor benzol. Even if a court could assume that any of the participating war instrumentalities, agencies, departments and board of the United States might have envisaged at the time of the transportation of the motor benzol that so small a portion (13.4%) of the industrial pure benzol processed from the motor benzol might ultimately find its way into civilian uses under allocations of the War Production Board, nevertheless it is submitted that the "controlling and preponderant" military or naval purposes so far predominated over such an eventual minor civilian use, that the Court on the record should hold that *all* shipments of the motor benzol were moving "for military or naval use", and were "military or naval" in character. This is particularly true in view of the fact that any civilian use of both motor

benzol and synthetic rubber was, at all times pertinent here, only the use permitted under war-time conservation orders designed strictly to limit civilian use thereof for purposes best designed to further defense and war. To illustrate, on April 20, 1942, Conservation Order No. M-137 was issued by the Director for Industry Operations of the War Production Board (7 F. R. 2944, Tr. 41). This order related to benzol, imposed restrictions upon the use and delivery of benzol, and taking effect immediately, began with the words: "the fulfillments of requirements for *the defense of the United States* has created a shortage in the supply of *benzene (benzol) for defense,* for private account and for export; and the following order is deemed necessary and appropriate in the public interest and *to promote the national defense.*" Amendments to this order were made on June 1, 1942, July 23, 1943, and June 1, 1944, imposing further restrictions on the use, delivery, and acceptance of delivery of benzol (Tr. 41). Similar conservation orders were designed to limit civilian uses of synthetic rubber strictly to uses best designed to further the prosecution of the war (Code of Federal Regulations, Title 32, Chap. 9, Part 938, issued December 31, 1941; amended by P. M. 2016, January 2, 1942; order as amended January 22, 1943, T-1663; General Preference Order No. M-13 revoked and superseded July 1, 1943, by Rubber Order R-1).

PART IV.

SOME THEORIES OF APPELLANT.

In conclusion, we seek to epitomize some of appellant's theories expressed or implied, and to make brief comment thereon.

(1) Appellant contends, that at the time of transportation the motor benzol stood in the name of Defense Supplies and therefore was not "property of the United States", because Defense Supplies was an entity separate and distinct from the United States and from its departments or boards. Any such contention is beside the point at issue. As stated by this Circuit Court of Appeals (*King County v. U. S. Shipping Board (supra)*) "here we are dealing with the status of the property", the status of the corporate entity is another subject. Appellant gives no heed to the necessities and conveniences of actual possession and custody of such property, notwithstanding the determination of our Supreme Court (*United States v. County of Allegheny (supra)*), that after all our Government is an abstraction and its possession of property largely constructive, with the actual possession and custody of Government property in some agency of the United States, be such agency either a natural person or a Government created entity, neither of which is or can be the United States. Though appellant cites several cases, it does not mention a case holding that property standing in the name of a corporate instrumentality of the United States is not the "property of the United States", where such issue was directly raised and determined.

Of course, appellant may not deny that the United States in carrying out its enumerated powers has the right to clothe its activities in corporate form.

(2) In similar vein, appellant contends that property, such as the motor benzol, standing in the name of a corporate instrumentality, such as Defense Supplies, is not "property of the United States" within the purview of the Transportation Act of 1940, because in some Acts Congress has recognized a distinction between the United States and its corporate instrumentality. In support of this contention, appellant suggests that there are various Acts of Congress in which there was placed after the term "United States" other terms specifically designed to include or exclude corporate instrumentalities of the United States. Appellant thereby seeks to say that whenever Congress has intended that the term "United States" should include governmental corporate instrumentalities, Congress has used apt words to indicate such intention. First of all, when enacting Section 321 of the Transportation Act of 1940, Congress acting under the threat of an all-out war had in mind the very subject of "property" for defense and war. Congress not only knew the use in the first World War of governmental corporate instrumentalities to facilitate the functions of Government during war, but Congress had just enacted a law (Section 5d (3) R.F.C. Act) to create these very corporate instrumentalities for defense and war. Congress also knew the existence of numerous decisions directly holding that property standing in the name of such war-time corporate instrumentalities is the "property of the United

States". There was no need to express such law of the land in Section 321 of the Transportation Act. In many of the Acts cited by appellant, it was necessary for the Congress to make added mention of such government agencies by reason of their corporate nature. From this very corporate nature flow legal consequences, which Congress may desire either to use or to obviate by special statutory provisions, as occasion may require. Indeed, if corporate instrumentalities could in no respect function differently than the natural human agencies of the United States, there would be scant reason to utilize the corporate form, as Congress had just done, for executing governmental powers in and for war.

(3) Appellant contends that the motor benzol was not "military or naval property" moving for "military or naval use", upon divers suggestions, including the fact that the motor benzol at the time of transportation was not in its then form suitable for military or naval use, because so many things had to be done therewith and added thereto. Appellant does not mention the decision of July 8 in *Northern Pacific Railway v. United States (supra)* which likely was not known to appellant. But appellant does know the stipulated facts and all the inferences reasonably deducible therefrom, and found below. War and its contemplation not only created Defense Supplies "in order to aid the Government of the United States in its national-defense program", but war and its contemplation created the very Congressional provision under which Defense Supplies was born to purchase and transport supplies required in the manufacture

of supplies necessary to the national defense, all-inclusive and including motor benzol so necessary for the manufacture of 100 high octane and synthetic rubber, so necessary for war. Four months after our country was at war, and before the very first act of Defense Supplies in relation to the motor benzol, its resolutions later amended, there was the Reid-War Production Board war program for the purchase of the motor benzol "through Defense Supplies", "as quickly as practicable", "to be allocated for defense purposes", because "immediate action is imperative", so that "this benzol will be available for synthetic rubber and aviation gasoline". It is to be remembered that the war program for benzol was national in scope and that our benzol here is but a small part of the whole (see War Production Board allocation to Defense Supplies for one month only, Tr. 63-64). Before any purchase of the motor benzol by Defense Supplies, there first was an allocation therefor made by War Production Board. From its transportation under Government Bills of Lading marked "For Military Use", every step taken with reference to the motor benzol was strictly under the control of the United States, acting only for war and solely by and through its war agencies such as War Production Board, Petroleum Administration for War, Office of Rubber Director, Aviation Petroleum Products Allocations Committee, including both the War Department and the Navy Department with their three contracts with Defense Supplies proclaiming that the execution and provisions of these contracts are deemed necessary, for *"the effective and successful prosecu-*

tion of the war", and all for no other possible purpose than the production of aviation gasoline and synthetic rubber for war-use. Thus, the benzol involved in this case was at all times subject to special war controls to channel it as "military or naval property" directly into "military or naval use". It can hardly be argued that if either the War Department or Navy Department itself acquired and transported select lumber to be thereafter processed and fabricated into gun stocks, to be added in turn to many other components and parts and thus made into rifles, that the lumber so acquired and transported was not "military or naval" in character or that its proposed use was not "military or naval". The programmed and actual use of the benzol, as a component of aviation gasoline and synthetic rubber to be used in the direct prosecution of the war, determines both its "military or naval" character and the "military or naval use" for which it was transported. Appellant does concede the "military or naval" character of synthetic rubber and aviation gasoline when and if in the hands of Army and Navy, but we are left to wonder how such "military or naval property" would reach such hands, without the benzol. Appellant does also state (a.b. 42) that the benzol was at most a strategic or critical material for use in connection with other materials in the manufacture or production of components, used with other materials for the production and manufacture of such "military or naval property" as aviation gasoline and synthetic rubber.

(4) Appellant likewise contends that, no matter where, when or why the motor benzol was processed into aviation gasoline and synthetic rubber, the motor benzol could not be "military or naval property" unless and until the products therefrom actually reached the hands of Army or Navy, under Congressional appropriations therefor. Such suggestions are to contend that Congress in using the term "United States" in the Transportation Act of 1940, intended to limit such term to two executive departments, the War Department and the Navy Department. On the contrary, Congress in its wisdom had no such intention, because Congress did not fail to vision that the United States would own and possess, as it did own and possess, property military or naval in character, otherwise than solely through its War and Navy Departments. The programmed and actual use of the motor benzol was financed by the United States, and not otherwise. In the Act whereunder Defense Supplies was created to aid the Government of the United States in its national-defense program, Congress made provision for the funds of Defense Supplies and like war-entities.

(5) Sorely pressed to advance something tenable, appellant suggests inferentially that benzol is found to be the subject of stereotyped conservation orders of war-time administrative boards like so many non-military or non-naval items, and that benzol consequently was during war in the same category of cocoa (a.b. 51) and of tea bags or tea balls (a.b. 53). This sequitur is a bit broader than its premises, and it hides from the stipulated facts.

CONCLUSION.

In conclusion, it is submitted that:

1. The motor benzol at the time of its transportation was "property of the United States" within the meaning of Section 321 (a) of the Transportation Act of 1940.

2. The motor benzol at the time of its transportation was "military or naval property of the United States moving for military or naval use" within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. Appellee, Reconstruction Finance Corporation, is entitled to the benefits of land-grant deductions with respect to all of the shipments of motor benzol, under the provisions of Section 321 (a) of the Transportation Act of 1940, and that, for this reason nothing is due appellant, and the judgment should be affirmed.

Dated, San Francisco, California,
September 6, 1946.

Respectfully submitted,
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(Appendices A, B and C Follow.)

Appendices.

Appendix A

Section 321 of the Transportation Act of 1940 (49 U.S.C.A., Sec. 65 in 1945 Cumulative Annual Pocket Part, page 77) provides:

"Sec. 65. GOVERNMENT TRAFFIC; RATES.

(a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of this title, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to chapters 1, 8, and 12 of this title of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: PROVIDED, HOWEVER, That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: PROVIDED FURTHER, That section 5 of Title 41 shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from September 18, 1940."

Appendix B

The Act of June 7, 1924 (10 U.S.C.A., Sec. 1375, page 237) provides:

"Sec. 1375. CHARGES FOR TRANSPORTATION BY LAND-GRANT RAILROADS SUBJECT TO REGULATIONS BY CONGRESS. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States over any railroad which under land-grant acts was aided in its construction by a grant of land on condition that said railroad shall be and remain a public highway for the use of the United States, and for which adjustment of compensation is required in accordance with decisions of the Supreme Court construing such land-grant acts, or over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service."

Appendix C

Section 5d (3) of the Reconstruction Finance Corporation Act, as amended (15 U.S.C.A., Sec. 606b (3), 1945 Cumulative Annual Pocket Part, pp. 164 and 165), provides:

"In order to aid the Government of the United States in its national-defense program, the Corporation is authorized——

* * * * * * *

(3) When requested by the Federal Loan Administrator, with the approval of the President, to create or organize, at any time prior to July 1, 1943, a corporation or corporations, with power (a) to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President; (b) to purchase and lease land, purchase, lease, build, and expand plants, and purchase and produce equipment, facilities, machinery, materials, and supplies for the manufacture of strategic and critical materials, arms, ammunition, and implements of war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith; * * * (g) to take such other action as the President and the Federal Loan Administrator may deem necessary to expedite the national-defense program, but the aggregate amount of the funds of the Reconstruction Finance Corporation which may be outstanding at any one time for carrying out this clause (g)

shall not exceed $200,000,000: * * * The Corporation may make loans to, or purchase the capital stock of, any such corporation for any purpose within the powers of the Corporation as above set forth related to the national-defense program, on such terms and conditions as the Corporation may determine."